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Amara verma
R.D.

1.
Single Bench
IN THE HIGH COURT OF JUDICATURE AT BILASPUR

(C.G.)

Cr. Appeal. No. 224 Of 2006

(Memorandum of Cr. Appeal u/s 374 (2) of Cr.P.C.)

APPELLANT:
(In Jail)

1. Kishore kumar , S/o Makhan Deepak
aged about 46 Years, residence of Village -
Hatkarra, Police Station – Korar, Distt.-
North Baster Kanker (C.G.)

-VERSUS-

RESPONDENT:

State of Chhattisgarh, through the
District Magistrate, Kanker (CG).

MEMORANDUM OF CRIMINAL APPEAL UNDER
SECTION 374 (2) OF Cr.P.C.

Conviction

Sentence

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.224/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Kishore Kumar

Versus

State of Chhattisgarh

Shri P.C.Pant, learned Counsel with Shri Nilesh Pant, Counsel for the appellant.

Shri Ashish Shukla, Government Advocate for the State.

ORAL JUDGMENT

(Delivered on 27th day of April 2006)

This appeal is directed against the judgment dated 31-01-2006 delivered by Shri B.Ram, Additional Sessions Judge, (F.T.C.), Kanker in Sessions Case No.406/2005 whereby the appellant was convicted under Section-363, 366 (A) of I.P.C. and was sentenced to undergo rigorous imprisonment for 5 years and fine of Rs.500/- in default of payment of fine to undergo additional rigorous imprisonment for 3 months for each offence. Both the sentences were ordered to run concurrently.

2. Briefly stated the prosecution story is that the prosecutrix left her maternal home on 11-07-2005. Her father Ganesh Das Manikpuri PW-2 lodged a missing report on 18-07-2005. On 01-08-2005, the prosecutrix came to the Police Station-Korar along with the appellant whereupon her parents were called at the Police Station. The report Ex.P-4 was lodged by Ganesh Das Manikpuri PW-2, father of the prosecutrix against the appellant on the same date. The prosecutrix was sent for medical examination. Dr. Smt. Sarita Goti PW-6 examined the prosecutrix and found that all her secondary sexual characters were fully developed.

Menses had started at the stage of 12 years. Hymen was ruptured. Vagina admitted two fingers without any pain. There was no sign of any injury or tenderness in the vagina. No definite opinion could be given about any recent sexual intercourse with the prosecutrix. Vaginal slides were prepared which were sent by the Police for chemical examination to the Forensic Science Laboratory. Report of the Forensic Science Laboratory was not produced during trial. The appellant was also medically examined by Dr. Sunil Bharati PW-14 who found that he was capable of performing sexual intercourse. No documentary proof relating to date of birth or age of the prosecutrix was furnished by the prosecution. Ossification test was also not conducted though advised by Dr. Smt. Sarita Goti PW-6. After completion of investigation, the appellant was prosecuted for the offences under Sections-363, 366(A) & 376 of the IPC. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 14 witnesses. Relying upon the evidence led by the prosecution, the trial Judge convicted the appellant for the offences under Section-363, 366-A of the IPC and sentenced the appellant as aforesaid in para-1 (Supra). The appellant was acquitted of the charge under Section-376 of IPC.

3. Shri P. C. Pant, learned counsel for the appellant has argued that the prosecution has miserably failed to prove the guilt of the appellant under Sections-363 & 366-A of the IPC. In the absence of any documentary proof or report of ossification and in view of the clear admission by Ganesh Das Manikpuri PW-2, Sukaro Bai PW-4 and the prosecutrix relating to ignorance about the date of birth of the prosecutrix, it could not be ruled out in view of the findings recorded by Dr. Smt. Sarita Goti PW-6 that the prosecutrix was aged 18 years or more on the date of occurrence. It was also contended that the admission

by the prosecutrix in para-14 that she went with the appellant of her own volition and also returned with the appellant on her own volition coupled with the admissions made by her in para-8, 9 & 10 of her testimony regarding not informing about the incident to anyone, clearly negatives the prosecution case under Section-363 & 366-A of IPC. It was also argued that the F.I.R. was lodged by Ganesh Das Manikpuri PW-2, father of the prosecutrix and not by the prosecutrix herself though she was present with the appellant at the Police Station of her own volition. On these premises, learned counsel argued that conviction and sentence awarded by the learned trial Judge deserves to be set aside. On the other hand, Shri Ashish Shukla, Govt. Advocate has argued in support of the impugned judgment.

4. Having considered the rival submissions, I have perused the record of Sessions Case No. 406/2005. There is absolutely no documentary evidence on record to establish the date of birth of the prosecutrix at the time of occurrence. Ossification test, though advised by Dr. Smt. Sarita Goti PW-6 was not conducted on the prosecutrix. Mark-list of the prosecutrix, though produced by the prosecution, was also not proved by leading any cogent evidence. The testimony of Ganesh Das Manikpuri PW-2 in para-10 clearly shows that he had mentioned the age of the prosecutrix by guess work while admitting her in the school and there could be variance of one or two years on either side. Sukaro Bai PW-4, grand mother of the prosecutrix also stated that she had no knowledge of the date of birth or age of the prosecutrix. The Prosecutrix herself has admitted in para-13 that she does not know her age and there could be variance of one or two years in the age which was recorded. In this view of the matter, the findings recorded by Dr. Smt. Sarita Goti PW-6 become relevant. She found on examination of the prosecutrix that

secondary sexual characters were fully developed. She ~~was~~ also found that hymen was ruptured. Even Dr.Smt. Sarita Goti PW-6 admitted in para-5 of her testimony that she did not express any opinion about the age of the prosecutrix and there could be variance of 2 years or even more in the age of the prosecutrix. Under these circumstances, the possibility that the prosecutrix was a girl of 18 years or more on the date of occurrence cannot be ruled out.

5. The testimony of the prosecutrix in para-2 clearly shows that the appellant was a frequent visitor in her house and she was in love with her and wanted to marry him. In para-14, she has made positive assertion that she went with the appellant of her own volition and that the appellant did not indulge in " *Galat Kam* ". She has also admitted that the appellant himself took her to the Police Station. She also admitted that she lived with the appellant on different places for almost 20 days and did not inform anybody during this period that she was kidnapped or lured by the appellant in any manner. In view of the positive assertion made by the prosecutrix in her testimony, it also cannot be ruled out that the prosecutrix, a girl aged 18 years had gone with the appellant of her own freewill. In this view of the matter, the evidence led by the prosecution fails to establish the guilt of the appellant under Section-363 and 366-A of the IPC. Conviction and sentence awarded by the learned trial Judge, therefore, deserves to be set aside.

6. In the result, the appeal is allowed. Conviction of the appellant under Section-363 and 366-A of the IPC is set aside. The appellant is acquitted and he shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge